89-1735

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

No.

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In 1988, Petitioner was indicted and convicted on 40 counts for violating the Clean Water Act, 33 U.S.C. §§ 1311, 1319(c)(2)(A) for placing topsoil and clean fill on 5 acres of his own property which the government claimed was a "water of the United States."

Despite the fact that Petitioner had no criminal history and there was no finding of any harm to water quality or wildlife, he was sentenced to prison for three years for the pre-Guideline counts, 27 months for the post-Guideline counts and fined $200,000. This was the longest sentence and the largest fine in the history of the United States imposed on an individual for any environmental crime. The fine represents over 1,000 percent of Petitioner's gross annual income. The questions presented are:

1. Whether petitioner's Fifth Amendment right to due process was violated when no evidence was introduced to prove beyond a reasonable doubt that his property was a "water of the United States" as defined by 33 C.F.R. § 328.3(a).

2. Whether placing "earth" on other earth constitutes a discharge of a "pollutant" "into water" under the Clean Water Act.

3. Whether Section 2Q1.2 of the U.S. Sentencing Guidelines is invalid because it was promulgated in violation of the Sentencing Reform Act, or otherwise was applied to Petitioner in violation of law.

4. Whether the sentence imposed violates the Excessive Fines Clause of the Eighth Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

JOHN POZSGAI,

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, John Pozsgai, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the court of appeals affirming Petitioner's conviction and sentence was issued on January 12, 1990 without any accompanying opinion and is listed at 897 F.2d 524 (3rd Cir. 1990)(App. 1a). The Judgment Including Sentence Under the Sentencing Reform Act was entered on July

19, 1989 (App. 4a). The order of the district court denying the Motion to Set Aside Verdict and to Enter Judgment of Acquittal, entered on January 27, 1989, was issued without any opinion (App. 14a).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A timely petition for rehearing was denied on February 8, 1990 (App. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Clean Water Act provisions, 33 U.S.C. §§ 1311(a), 1319(c)(2), 1344(a),(e), 1362, and 33 C.F.R. § 328.3(a) are reproduced, *infra*, App. 17a-20a. The Sentencing Reform Act provisions 28 U.S.C. §§ 991, 994(b)(1), (c), (f), (j), (m), and 3553(a) are reproduced, *infra*, App. 20a-23a.

3. United States Sentencing Guidelines §§ 2Q1.2 and 2Q1.3 are reproduced, *infra*, App. 25a.

STATEMENT OF THE CASE

Petitioner, a 57-year-old Hungarian emigre, is a self-employed truck mechanic who works seven days a week in a small garage behind his house in Morrisville, Pennsylvania. Across the street from his home in Morrisville (near Trenton, New Jersey) is a 14-acre lot, which had been used for some 20 years as a dump site for various types of old fill and junk, including auto body parts, and thousands of old tires (R-84, 87, 139, 141).[1] The property is zoned light industrial, and is bordered on the north by Bridge Street, on the south by a four-lane superhighway (U.S. Route 1), an auto salvage yard on the west, and a tire dealership on the east. (Appended are Govt. Exhibits 1 and 7, aerial photographs of the property taken in 1985 and 1987, App. 40a.) Petitioner saw the property not as a dump site, but as an opportunity. By cleaning it up, removing the old tires, and filling a portion of the property, he could fulfill his dream of building a larger garage so that he could expand his truck repair business from its cramped quarters (R-85-86). The government saw the matter differently.

The U.S. Army Corps of Engineers inspected the property beginning in April 1987 and claimed that because of the presence of such vegetation as "skunk cabbage," a common weed, and "sweet gum trees," a common tree endemic to the eastern third of the United States, portions of the property contained "wetlands."[2]

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[1] "R" refers to the Record Appendix below.

[2] The Corps determined that the petitioner's property was "above the headwaters," meaning that he was eligible to fill up to 10-acres of essentially isolated wetlands under the Corps' Nationwide Permit No. 26 because of the minimal impact such fill has on the environ-

(continued...)

The site is not a marsh, swamp, or bog, nor is it listed on the National Wetland Inventory Map.

Petitioner believed that tires dumped in a tiny stream that trickled along the edge of the property caused part of the site to occasionally flood during heavy rains, and that by removing the tires, the property would drain properly.

Petitioner completed the purchase of the property in June 1987 and continued the laborious process of cleaning up the property by removing the thousands of tires and junk parts, and allowing top soil, earth, and clean fill materials to be placed on a few acres of the upland and "wetland" portion of the property along Bridge Street. In the meantime, with the help of his daughter, he sought the assistance of several engineers, who were unable to complete the various permit forms. He did, however, obtain a Bucks County soil erosion permit in May 1988 and maintained a protective silt skirt fence along the small stream (R-Add. H.)

On August 17, 1988, special agents of the Environmental Protection Agency installed video surveillance cameras across the street from the property. On August 24, the government filed a civil suit and obtained an *ex parte* Temporary Restraining Order which they served that evening on Petitioner. Although Petitioner

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[2](...continued)
ment. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.5(a)(26) (R-159); *see Riverside Irrigation District v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985). If a person wants to take advantage of this 10-acre exemption, "an application for a DA [Department of Army] permit does *not* have to be made.") 33 C.F.R. § 320.1(c) (emphasis added). However, the Corps insisted that he fill one out and that a Water Quality Certificate from Pennsylvania under 33 U.S.C. § 1341 was needed.

placed blockades around the property and traveled to the Pennsylvania Department of Natural Resources in Harrisburg, Pennsylvania to try to resolve the problem, several trucks were in the next few days filmed entering the property and discharging clean fill. No toxic or hazardous waste was involved.

Before the completion of any civil contempt proceeding, Federal Agents came to Petitioner's house on September 12, 1988, placed him in handcuffs, and booked him. On September 29, 1988, he was indicted on 41 Counts of violating the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(2)(A), by allowing topsoil, earth, and similar clean, non-toxic fill to be placed onto approximately 5 acres of his property without first obtaining an individual permit under 33 U.S.C. § 1344(a).[3]

This case was tried in the United States District Court for the Eastern District of Pennsylvania, before a jury, presided over by the Honorable Marvin Katz. The jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1345 and 1355. The prosecution presented evidence that portions of the property technically constituted wetlands. There was no evidence that any wildlife or fishery habitat was harmed, or that water quality was impaired.

The defense expert contended that the property was not a wetland, and that whatever wetland characteristics that the property may have exhibited were attributable to the damming effect of the tires in the stream, and that once the tires were removed, the hydrology would change and the property would drain properly and revert

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[3] The Corps never issued a formal cease and desist "order" under their own regulations, which would have specified what the penalties could have been. *See* 33 C.F.R. § 326.3(c)(1), (3).

to its upland condition. The trial took place from December 27 through December 30, 1988.

At the close of the government's case, the defense moved for a directed verdict since the government failed to introduce any evidence that the stream was a tributary of the Pennsylvania Canal or that the Canal was or is used in interstate commerce. These key jurisdictional elements of the offense were cited by the prosecutor in his opening statement as "important in the case." The court denied the motion from the bench without stating any reasons. The jury convicted Petitioner on all Counts.

On January 5, 1989, the defendant filed a Motion to Set Aside the Verdict and Enter Judgment of Acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Petitioner renewed his jurisdictional argument. The trial court denied the motion to set aside the verdict by Order dated January 27, 1989 without stating any reasons (App. 14a).

Despite the fact that: 1) Petitioner had no criminal history; 2) that the former dumpsite/"wetland" supported no wildlife nor fishery habitat; 3) that nothing was dumped or placed into the water of the adjacent stream (indeed, at the sentencing, Petitioner submitted an environmental assessment of the property prepared by soil scientist Dr. Wendell Kirkham and not disputed by the government that the tiny stream on Petitioner's property runs clearer than it did before Petitioner bought the property because of his removing the junk from the stream); 4) that there was no showing that the topsoil and clean fill placed on the adjacent property contaminated or affected the quality of the water in the nearby stream; and 5) that this was not a serious crime according to the Presentence Report prepared by the

Probation Office, the Court, at the urging of the government to make an example out of Petitioner in order to "send a message to all property owners" and to implement President Bush's "no net-loss of wetlands" goal, sentenced Petitioner on July 13, 1989 under 33 U.S.C. § 1319(c)(2)(A) to the unprecedented statutory *maximum* sentence of three years imprisonment on Counts One through Fourteen which occurred before the Sentencing Guidelines took affect, and to 27 months imprisonment on Counts Sixteen through Forty-one for the post-Guideline conduct.

The staggering 27-month sentence -- equivalent to 81 months, or approximately 7 years if it had been imposed before the Guidelines due to the availability of parole after serving one-third of the sentence -- was the *maximum* sentence the Court could impose pursuant to its interpretation of Section 2Q1.3, the Sentencing Guidelines applicable for environmental offenses involving non-toxic, non-hazardous substances. Sentence of imprisonment on Count Fifteen was suspended and Petitioner was placed on probation for 5 years, the *maximum* term available for any federal offense, to be served after he is released from prison, and to restore the property unless he received an after-the-fact permit.

For the Guidelines counts, petitioner received 6 points (the base offense level) for discharging a pollutant without a permit. § 2Q1.3(a). He also received six additional points for discharging a pollutant (§ 2Q1.3(b)(1)(A)), and four more for not having the permit (§ 2Q1.3(b)(4)). This "double counting" for the same conduct led to a total score of 16, which translates to a sentence of between 21 and 27 months. Petitioner requested that he be placed on probation because of his wife's heart condition and their strong community ties. Judge Katz refused his request.

This draconian sentence, for what was essentially a regulatory offense, was the longest unsuspended jail term imposed in the history of the United States for *any* environmental crime, including the dumping of extremely toxic and hazardous wastes and where people were even injured and killed.

The Court was not yet finished with the Petitioner. Despite the fact that Mr. Pozsgai has a gross income of approximately $20,000 a year, no savings, and a negative net worth, information in the probation report and acknowledged by the Court, the Court nevertheless fined Petitioner $200,000, ($5,000 for each of the 40 counts), and imposed a mandatory assessment of $2,000 for the Crime Victims Fund ($50 for each of the 40 counts). The Probation Report (erroneously concluding that such fines were mandatory) stated that such a fine would "financially devastate" Petitioner and his family. This fine, approximately 1,000 percent of Petitioner's gross income, was the *largest* fine ever imposed in the history of the United States by severalfold on an individual for an environmental crime, or, for that matter, for most other crimes.[4]

Contrary to the request by the government, however, the trial court did not order that the defendant be taken immediately into custody. Instead, bail was continued pending appeal because the court found that the "alleged failure by the government to prove: (1) that the streams to which the wetlands at issue were adjacent are tributaries of the Pennsylvania Canal; and

---

[4] Fines are not imposed in over 68 percent of all federal crimes. In the 30 percent of the cases that fines are imposed, the average fine levied (including restitution) is approximately $8,000, with the median being only $525. U.S. Sentencing Commission, *Annual Report* 34 (1988).

(2) that the Pennsylvania Canal is a "water of the United States" raises a substantial question of law or fact likely to result in reversal," an issue which neither the district court nor the court of appeals has given any inkling as to why it lacks merit (App. 12a).

On appeal, Petitioner made a number of substantial arguments as to why the conviction should be overturned or, in the alternative, why the case should be remanded for resentencing, including 1) the total failure of the government to offer any evidence, let alone prove beyond a reasonable doubt, the jurisdictional element of the offense, 2) that Petitioner's activity was authorized by the Corps' Nationwide Permit No. 26, 3) that Petitioner did not discharge "pollutants" as defined in the Clean Water Act, 4) that the district court misapplied the Sentencing Guidelines or that § 2Q1.3 of the Guidelines was unlawfully promulgated, 5) that the sentence and fine were otherwise excessive.

On January 12, 1990, a panel of the United States Court of Appeals for the Third Circuit, without holding any oral argument and without stating any reasons for its decision, issued a Judgment Order summarily affirming the judgment of conviction and the sentence (App. 1a). On January 26, 1990, a timely petition for rehearing and suggestion for rehearing *en banc* was filed, which was denied on February 8, 1990 (App. 15a).

REASONS FOR GRANTING THE PETITION

Because this case and numerous other "wetland" cases around the country deal with the authority of the federal government to regulate, and in some cases take, private property protected under the Constitution, it is especially important that this Court, as protector of such freedoms, ensure that the federal government not over-

flow the channels of its jurisdictional boundaries. This is especially so where, as here, substantial liberty interests are also at stake. Unfortunately, the courts below abandoned their role in this respect, and did so without leaving a clue as to why. For that key reason, this Court should take particular care to review this case.

As for the Sentencing Guideline Issue, this Court, having ruled in *Mistretta v. United States*, 109 S.Ct. 649 (1989), that Congress could delegate power to the U.S. Sentencing Commission to set Sentencing Guidelines should now decide whether the U.S. Sentencing Commission followed the mandate of Congress in promulgating a category of those Guidelines, *i.e.*, Section 2Q1.3.

I. THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE AND PROVE THAT PETITIONER'S PROPERTY CONSTITUTED "WATERS OF THE UNITED STATES," AS DEFINED BY 33 C.F.R. § 328.3(a)(1).

Petitioner was charged with and convicted for "discharg[ing]" certain "pollutants" into certain "navigable waters" of the United States. 33 U.S.C. § 1319(c)(1); § 1362(12). "Navigable waters" is defined in the statute without further explanation as simply "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The U.S. Army Corps of Engineers regulation, 33 C.F.R. § 328.3(a), defines "waters of the United States", in pertinent part, as "(a)(1) All *waters which* are currently used, or *were used* in the past, or may be susceptible to use *in interstate or foreign commerce*,. . . [and] (5) *[t]ributaries* of waters identified in paragraphs (a)(1) through (4) of this section . . . [and] (7) [w]*et-*

lands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. *Id.* (emphasis added).

Accordingly, the indictment charged Petitioner with placing fill onto "wetlands" "adjacent" to an "unnamed tributary of the Pennsylvania Canal" which is alleged to be a "water of the United States as defined . . . 33 C.F.R. § 328.3(a)(1)." *See* Indictment, Count One, ¶¶ 2-4 (emphasis added) (R-134). Consequently, in order for the Corps to have jurisdiction, the Government was required to prove beyond a resonable doubt: (1) that the Pennsylvania Canal is a "water of the United States" which is or was used in "interstate commerce" under § 328.3(a)(1), and that (2) the small stream which runs through and along the eastern edge of the site and thus adjacent to Petitioner's property is a "tributary" of that waterbody.

In his opening statement to the jury, the prosecutor recognized that these were "important" elements of the crime:

> SETH WEBER: *You will hear* that on that property that Mr. Pozsgai finally bought in June of 1987, there is a small stream which is also going to be referred to in testimony, I believe as a tributary.
>
> A tributary is a small body of water that *leads into* a larger body of water.
>
> This small stream on Mr. Pozsgai's property *led into* what is called the Pennsylvania canal.
>
> *You will hear* about the Pennsylvania canal.

> A little bit of the history of the Pennsylvania canal, *how it was used for the boats to go up and down the canal to transport things in interstate commerce* and things of that nature.
>
> *That becomes important in the case.*

(App. 134-35) (emphasis added).

Petitioner agrees with the government that these are "important" elements of the offense. Failure to prove them beyond a reasonable doubt is fatal. Yet the prosecutor's opening statement was the first and last time the jury heard anything about the stream leading into the Pennsylvania Canal, or the canal being used in interstate commerce. Opening statements, of course, are not evidence in a case.

As required by this Court's teachings, the government was required as a matter of due process to introduce evidence and prove beyond a reasonable doubt each of these jurisdictional elements of the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Glasser v. United States*, 315 U.S. 60 (1942); *In Re Winship*, 397 U.S. 358, 364 (1970) ("Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

1. The government points to no testimony where any of its witnesses were asked whether the tiny stream on Petitioner's property led into the Pennsylvania Canal. The Canal is located a good distance from the site and separated from it by, *inter alia*, a four-lane major highway and a lumber yard.

On appeal, the government tried to plug this fatal gap in its case by arguing that "On the issue *of adjacency*, the government introduced exhibits showing the relationship between the Pozsgai site and the unnamed tributary *flowing through* the site. Government Exhs. 1 and 7 (aerial photographs). Govt. Br. 27 (emphasis added).

However, "adjacency" was *not* an issue in this case. The question is not whether the stream flows *through* the site, but rather where does it flow *to*. Does it flow into the Pennsylvania Canal? Does it flow into another stream that is not a "water of the United States"? Does it simply seep into the ground and therefore is not a tributary of anything? Where was the testimony on this issue that the prosecutor promised the jury in his opening statement?

a. Realizing the complete absence of any testimony on this key jurisdictional element of the offense, the government desparately tried to use demonstrative evidence to shore up its case by unequivocally asserting "These Exhibits [Govt. Exhs. 1 and 7 (aerial photographs)] also show that the stream *flows into* the Pennsylvania Canal." Govt. Br. 27. (emphasis added). The panel below, assuming it examined these two aerial photographs, likely misapprehended this evidence since the photographs do *not* show *any* stream, let alone the one on petitioner's property, flowing into the canal.[5]

---

[5] When counsel for Petitioner, who was not his trial counsel, first went to examine these photographs on the day after being served with the government's appellate brief, he discovered that these two aerial photographs were inexplicably missing from the custody of the deputy clerk. They were finally returned to the clerk by the government after all the appellate briefs were filed in

(continued...)

At least without the assistance of an expert in aerial photography to decipher the maps, or testimony by someone on the ground who traced the stream, a jury would be merely speculating about which of the many fuzzy dark lines on the photograph is the stream in question, and whether that stream flows from Petitioner's property into the Pennsylvania Canal.

Even the government's witness who was merely describing the stream on the property for the purposes of showing adjacency, pointed to the aerial photograph [Govt. Exh. 7] and told the jury, "*You can't see it* [the stream] exactly on this." (Testimony of Mr. Claffey) Govt. Br. 27. Surely, if the jury cannot see the stream on Petitioner's property on this aerial photograph, it would be entirely speculative for the jury to determine if, how, and where that stream flows into the Pennsylvania Canal. While we admit that the Pennsylvania Canal is depicted on the photographs as a government witness stated by a "dark line," there is no other "dark line" connected to it from *any* discernible point, and

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[5](...continued)
this case.

The Justice Department attorney who authored the appellate brief admitted to petitioner's counsel that he did not examine the aerial photographs when he made the unequivocal statement, in the government's brief to the court of appeals that the photographs show the stream on Mr. Pozsgai's property "flow[ing] into" the Pennsylvania Canal. Rather, he claimed to rely on the prosecutor's recollectiion of what the photographs depicted from the trial a year ago. This sudden recollection on the part of the prosecutor is surprising, since he made no such claim shortly after the trial in response to the defendant's assertion in his Motion for Judgment of Acquittal, when, presumably, his recollection was fresher.

certainly no dark line from Petitioner's property, located some distance away.[6]

To sustain the conviction, the court below had to conclude that a lay jury, by simply looking at the photographs without the aid of testimony, could find beyond a reasonable doubt that the stream on Petitioner's property flows into the Pennsylvania Canal. Clearly, no reasonable jury could do so. This issue is not one of witness credibility on which the trier of fact is given substantial deference.

On the contrary, "sufficiency of the evidence is a question of law subject to *de novo* review. . . . We owe no special deference to the district court on this issue." *See United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989). At best, the government might argue that these two aerial photographs constitute a modicum of evidence (which they are not) to prove that the stream is a tributary of the Pennsylvania Canal. However, a "'mere modicum' of evidence, making the existence of an element of the crime slightly more probable than it would be without the evidence, by itself is not sufficient." *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981), *citing Jackson v. Virginia*, 443 U.S. 307, 320 (1979). As the *Jackson* Court stated, "it could not seriously be argued that such a 'modicum' of evidence

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[6] Lest there be any question about this point, appended are reproductions of Government Exhibits 1 and 7 (taken in March 1985 and April 1987, respectively) (App. 40a). Each of the two aerial photographs are approximately 24 by 35 inches in size and were taken by the government at different elevations. In order to reproduce them in this brief, they are first reduced to show the entire exhibit. The revelant portion of each photograph showing Petitioner's property and the Pennsylvania Canal are then reproduced in the same dimension as the jury saw them. Dark ink lines outlining part of the tract are the delineations of the "wetland" made by the government's witness.

could by itself rationally support a conviction beyond a reasonable doubt." 443 U.S. at 320. Surely, it is not asking too much of the government that before it sends Petitioner to prison for three years for placing topsoil and fill on his own property and exacts fines of over $200,000, the prosecutor make good on his promise (and legal duty) to present testimony on a "important" element of the offense, especially where the fact at issue is one that is objectively determinable.

2. Clearly, the government also failed to prove that the Pennsylvania Canal was or is used in interstate commerce. 33 C.F.R. § 328.3(a)(1). While the prosecutor promised the jury they would hear testimony about the history of the Pennsylvania Canal and its alleged prior use in interstate commerce, none was forthcoming.

On appeal, the government tried to shore up this fatal gap in its case by cavalierly concluding in a footnote: "It cannot be seriously disputed that the Pennsylvania Canal is a navigable waterway within the meaning of 33 C.F.R. § 328.3(a)(1). A canal is defined as 'an artificial waterway for navigation *or* for draining *or* irrigating land.' Webster's Seventh New Collegiate Dictionary." Govt. Br. 27, n.19 (emphasis added).

This dictionary definition is not merely insufficient evidence, it is no evidence at all. In the first place, the definition relied upon by the government is phrased in the double disjunctive, so that the word "canal" could mean an artificial waterway used for draining purposes but be *incapable* of supporting any actual navigation. In any event, 33 C.F.R. § 328.3(a)(1) requires proof that the canal is or has been used in "interstate or foreign commerce." Thus, the *Pennsylvania* Canal, even if used for navigation, could reasonably be understood as

having been so used in *intrastate*, rather than interstate commerce. The trial court did *not* take judicial notice that the Pennsylvania Canal was used in interstate commerce, nor did the government make any request that it should. The prosecutor simply reneged on his promise to the jury that they would hear historical testimony to prove this "important" element of the offense.[7]

The court below was required to reverse the conviction unless it found that "there is substantial evidence... to support a jury's finding of guilt beyond a reasonable doubt..." *Government of Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984). Clearly, the evidence in this case to prove the government's jurisdiction over Petitioner's property, a crucial element of the crime is, as a matter of law, insufficient under the Due Process Clause to support a verdict of guilty beyond a reasonable doubt.

If the government must prove impacts on interstate commerce when prosecuting racketeers and other such criminals (see *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982)), surely it must do so when prosecuting its citizens for placing clean fill on their own property.

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[7] In *United States v. Commodore Club, Inc.*, 418 F. Supp. 311 (E.D. Mich. 1976), the defendants were criminally prosecuted for violating the Rivers and Harbor Act for failing to have permit for filling in "a navigable water." The court found that while the evidence to prove this essential element may be sufficient if it were a civil case, it noted that "this case is presented to the Court in the criminal context,"; accordingly, "this Court will not entertain such a presumption in a criminal prosecution. The Government was required to prove beyond a reasonable doubt that the filled area [was a navigable water] and this it failed to do." 418 F. Supp. at 318, 322.

II. THE GOVERNMENT DID NOT PROVE THAT PETITIONER DISCHARGED "POLLUTANTS" "INTO WATER" AS DEFINED IN 33 U.S.C. § 1362(6).

This is an important issue of statutory construction which goes to the heart of the case as to whether "pollutants" were discharged, assuming the property in question was a "water of the United States." Even if the Court does not grant review of this issue, the discussion presented here nevertheless relates to Questions 3 and 4 by underscoring how far afield from the core offense conduct prohibited by the Clean Water Act were Petitioner's so-called water pollution activities.

The quintessential element of each of the 40 counts that the government had to prove beyond a reasonable doubt was that the Petitioner discharged certain "pollutants" defined in 33 U.S.C. § 1362(6) as follows:

> (6) The term "pollutant" *means* dredged spoil, solid waste, incinerator residue, . . . discharged *into water* (emphasis added).

The term "pollutant" is thus defined in terms of specific substances being discharged "*into water*" The law is clear and unambiguous. It does *not* say into "waters of the United States" or "navigable waters" or "wetlands" or "moist soil" or "dry land that the Corps determines to be water," but "water" as that term is commonly understood to mean the liquid state of H_2O.[8] The definition also uses the prepositional phrase "*into*

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[8] "Water" is defined as "the liquid of which seas, lakes, and rivers are composed and which falls as rain and issues from springs. When pure it is transparent, colourless (except as seen in large quantity, when it has a blue tint), tasteless and odourless." 2 Oxford English Dictionary 3701 (Compact Ed. 1971).

water," not "near water" or "*onto* wetlands." *Cf. United States v. GAF Corporation*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) ("discharge of a pollutant" does not include discharge into subsurface wells).[9]

The government dismissed this argument in its brief below as an "innovative reading of the Act" contrary to the intent of Congress and case authority. Govt. Br. 32. Petitioner sees nothing "innovative" about interpreting the word "water" to mean "water". What is "innovative" is the government's strained reading of the statute, namely, that placing "earth" on other earth constitutes a discharge of "pollutants into water."[10] Petitioner's reading of the law is entirely consistent with the intent of the Congress that enacted the Clean *Water* Act. That intent can best be discerned from the language Congress employed.

It is a cardinal principal of statutory construction that the language chosen by the Congress be given its plain meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *TVA v. Hill*, 437 U.S. 153 (1978). This rule is particularly adhered to in criminal cases. *United States v. Enmons*, 410 U.S. 396, 411 (1973) ("This being a criminal statute, it must be strictly construed, and any ambiguity resolved in favor of

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[9] The trial court erroneously instructed the jury on this key element of the offense by stating, "The third element [of the offense] is that the defendant discharged pollutants. The term, pollutant, means spoils, solid waste, rocks, sand, cellar dirt and industrial waste discharged into *wetlands*." Tr. 12/30/88 Judge Katz 79-80 (emphasis added).

[10] Even the Corps of Engineers seems to acknowledge this distinction by defining "fill material" as "*not* includ[ing] any pollutant discharged *into* the *water* primarily to dispose of waste, as that activity is regulated [by the EPA] under section 402 of the Clean Water Act." 33 C.F.R. § 323.2(e) (emphasis added).

lenity.") *See also United States v. Standard Brewery*, 251 U.S. 210 (1920) (Administrative rulings cannot add to an Act of Congress and make conduct criminal which that law leaves untouched). Neither the Corps of Engineers nor the EPA has any other regulatory definition of the term "pollutants" or "water." Accordingly, interpreting the word "into water" to mean exactly that, is the only permissible judicial construction of the word. In *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396, 1405 (1987), this Court unanimously rejected the Ninth Circuit's opinion that the term "in Alaska" should be construed "in a general, 'nontechnical' sense to mean the geographic region of Alaska, including the Outer Continental Shelf." There is nothing ambiguous about the phrase "into water" and therefore the phrase should be given its plain and ordinary meaning. *See United States v. Locke*, 471 U.S. 84 (1985) (statutory phrase requiring mining claims to be file "prior to December 31" required rejection of claims filed on December 31). Neither the EPA nor the Corps has any regulatory definition of "pollutant" different from the one enacted by Congress; accordingly, the plain meaning of the statute controls.

Interpreting "water" as liquid water is certainly in keeping with Congress' intent to regulate the discharge of pollutants into our nation's territorial seas, bays, lakes, ponds, reservoirs, rivers, and streams, and even familiar wetlands such as swamps, bayous, everglades, and marshes which usually contain surface water.[11]

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[11] When interpreting a statute for criminal purposes, there is a "long established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Dunn v. United States*, 442 U.S. 100, 112 (1979), and this the lower court failed to do. *Enmons, supra; United States v. Braverman*, 373 U.S. 405, 408 (1963); *United States v. Moore*, 613 F.2d 1029, 1043 (D.C. Cir.

(continued...)

In any event, the Corps is free to promulgate a regulation interpreting the phrase "into water." *See Tabb Lakes, Ltd. v. United States*, No. 89-2905 (4th Cir. Sept. 19, 1989) (attempt by Corps to regulate certain wetlands because they are used by migratory birds such as robins is struck down since such jurisdictional coverage must be specified in regulations promulgated under the Administrative Procedures Act). Of course, the Congress can, and should, address this issue as well. In the meantime, "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct 2854, 2863 (1989).

III. SECTION 2Q1.3 OF THE SENTENCING GUIDELINES IS UNLAWFUL AS PROMULGATED OR AS APPLIED IN THIS CASE.

The Sentencing Reform Act of 1984, generally, 18 U.S.C. §§ 3551 through 3742, and 28 U.S.C. §§ 991 through 998, was enacted as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II (Oct 12, 1984), to reform the federal sentencing system. The essential premise behind the Sentencing Reform Act was that sentencing under past law, which granted judges broad discretion, resulted in a fragmented sentencing system characterized by unwarranted disparity and a lack of fairness. The issue of unwarranted disparity in sentencing was of paramount importance in

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[11](...continued)
1979), cert. denied 446 U.S. 954 (1980). *See also* Blackstone *Commentaries* 88 (1765) (citing 1 Edw VI, c. 12(1547) (law making it a crime to steal "horses" will not support conviction of a person who stole only one horse).

the passage of the Sentencing Reform Act, as revealed in the report of the Senate Judiciary Committee on the Crime Control Act of 1983, S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), reprinted in 1984 U.S. Code Cong. and Ad. News 3182, 3220-3373.

It is undisputed that the 27-month prison sentence imposed on Petitioner, if upheld, will be the longest prison term served by anyone for any environmental violation, including those involving the deliberate dumping of toxic and hazardous wastes. Close behind him is 58-year-old Ocie Mills and his son, now serving 21 months for placing 19 loads of clean sand on his half-acre lot in Florida. *United States v. Mills*, No. 88-03100-01/WEA (N.D. Fla. 1989), *appeal pending* (11th Cir. no. 89-3325). The criminal disposition of each individual environmental pollution case in fiscal years 1983-1989 show that the usual sentence for real polluters was a modest fine and probation. Actual incarceration was reserved for the most serious offenders, and even then involved only a short stay of a few days to several months. *No* person went to jail for the discharge of a non-toxic pollutant.[12]

Even now, the application of the guidelines is producing gross disparities. *See United States v. Bogas*, CR88-282 (N.D. Ohio, Feb. 13, 1990), *appeal by gov't dism'd*, No. 90-3228 (6th Cir. April 13, 1990) (hazardous waste polluter who lied to EPA, given 180 days home detention) Clearly, Petitioner should not have received a greater sentence than Mr. Bogas. How did the Guidelines, which were intended to reduce dispari-

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[12] *See* U.S. Environmental Protection Agency, Office of Enforcement and Compliance Activity: Summary of Criminal Prosecution Resulting from Environmental Investigations (April 1989). The summary for Fiscal Year 1985 is reproduced, *infra*, App. 30a.

ties, not create them, produce such unjust results? The basic flaw is in the drafting of § 2Q1.3 and its hazardous companion § 2Q1.2.

Petitioner was charged with discharging earth and clean fill without a permit. Under § 2Q1.3, that offense constitutes both the base offense, as well as the two specific offense characteristics of discharging a pollutant (§ 2Q1.3(b)(1))[13] and not having a permit under § 2Q1.3(4). This causes an increase of the base offense level for this regulatory offense from a score of 6 (which permits a court to impose probation) to 16, requiring imprisonment from 21 to 27 months. If this "double counting" is a correct application of the guidelines, then every discharge of clean non-toxic fill dirt without a permit will *automatically* result in a score of at least 14, and more likely 16, thereby requiring a mandatory *minimum* jail term of at least 15 months, and more likely, 21 months. This surely cannot be correct when the *maximum* jail term for the worst water polluter in the country could not by law, until 1987, have exceeded one year. Indeed, the Guidelines were already drafted (although not in effect) before the Clean Water Act was amended in early 1987--which, *inter alia*, increased the maximum penalty from 1 year to 3 years for water polluters. In fact, there are a number of environmental statutes covered under both §§ 2Q1.2 and 2Q1.3 which are misdemeanors, violation of which cannot result in more than one year in jail, yet the

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[13] The district court apparently rejected Petitioner's argument at sentencing that since § 2Q1.3(b)(1) presupposes "actual environmental contamination" according to Application Note 4, and should not be applied to Petitioner, there was no contamination. The plain meaning of § 2Q1.3(b)(1) apparently was accepted by the court. Petitioner seeks review of the possible misapplication of the Guidelines to his case.

Guidelines virtually dictate a mandatory minimum sentence of the statutory maximum for a first offender.[14]

As Petitioner argued below, § 2Q1.3 is invalid on its face and as applied in this case because 1) the Commission did not follow 28 U.S.C. § 994(m) which mandates that the Commission "ascertain the average sentences imposed" for the category of environmental offenses *before* devising a sentencing guideline for that category; 2) § 2Q1.3 clearly contravenes 28 U.S.C. § 994(f) which requires that the Guidelines "provid[e] certainty and *fairness* in sentencing and *reducing sentencing disparities*" (emphasis added); 3) § 2Q1.3 contravenes 28 U.S.C. § 994(j) which requires that the guidelines "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (emphasis added); and 4) the Guidelines are inconsistent with the purposes of sentencing described in 18 U.S.C. § 3553. While courts can depart from the Guidelines, they can do so only if it is clear that the Commission did not consider unusual mitigating or aggravating circumstances. § 5K2.0. On their face, the Guidelines do appear to account for various offense factors; however, the Commission did not exercise its independent judgment in establishing them. The fundamental flaw with these Guidelines is that the Sentencing Commission did not follow Congress' mandate by reviewing past sentencing practices in order to determine "average sentences imposed in [each] category of cases" [28 U.S.C. § 1994(m)] as

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[14] *See United States v. Fisher*, CR 89-234 (D. Ore. Feb. 12, 1990) (Guidelines called for a 21-month sentence when statutory maximum for negligent discharge under 33 U.S.C. § 1319(c)(1)(A) was one year).

their starting point before the Commission was to exercise its independent judgment about whether to depart from such past practice. In short, the Commission failed to do its homework.

The source material used by the Commission in determining past sentencing practices was a 1,279 page report of some 40,000 sentences imposed from January 1, 1984 to February 28, 1985 prepared by The Federal Judicial Center in 1986. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986) The categories covered are Crimes of Violence, Property Offenses, Drug Offenses, Offenses Involving The Justice System, Firearms and Explosives Offenses, Immigration and Citizenship Offenses, Miscellaneous Offenses, and Corporate Crime. *Id.* Conspicuously absent from this report is any historical information on sentences and fines imposed for criminal violations of the Clean Water Act or the host of other environmental laws on the books.[15] In short, the Commission did not exercise its considered judgment in passing on these guidelines. If the Commission had examined and analyzed the dispositions of the environmental pollution cases from fiscal years 1983-1989 (which was submitted to the court of appeals), it would have concluded that the usual sentence was a modest fine, probation, and in some cases, restoration, even for persistent violators who ignored agency warnings. *Id.*

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[15] The only environmentally related category of sentences in the Miscellaneous Offense area is the killing or smuggling of endangered or protected animals or plants. There were 208 offenders in this category, and § 2Q2.1 fairly tracks the average sentences that were imposed in this category. *Id.* at 8-85. *But see United States v. Van Fossan*, 1990 U.S. App. LEXIS 5247 (7th Cir. Apr. 9, 1990).

The gross disparities between these typical sentences and the instant case are striking enough, but when one considers that before the Guidelines, a person was eligible for parole after serving one-third of his sentence, the Guideline sentence of 27 months imposed here is equivalent to a staggering sentence of *81 months*, almost 7 years, a plainly unreasonable sentence where the maximum statutory sentence was only 1 year. *See, e.g, United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989)(experienced developer given 6-month suspended sentence and fined $10,000 for filling in 5 acres of wetlands after being warned). The *Marathon* case was the first criminal prosecution of a wetlands case.

Indeed, it was Congress' clear intent that "for the most part the average time served should be similar to that served today in like cases." S. Rep. No. 225, *supra* at 116. That intent was clearly disregarded by the Commission in promulgating § 2Q1.3.

The Commission neither has identified in any of its literature what historical data it had used in developing these particular Guidelines nor given any reasons why it substantially departed from past sentencing practice in this area.[16]

In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), the court invalidated the application of section

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[16] Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, reprinted in S. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988). See also, *id.* at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

2J1.6 of the Guidelines because it is "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing overly harsh and unreasonable results. *Id.* at 892. Analogizing the Commission to a regulatory agency, the standard of review is whether the Guidelines are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, *citing FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). *See also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984).

However, when the statute, as here, clearly commands the agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. Recently, the U.S. Court of Appeals for the District of Columbia Circuit reviewed whether the EPA had properly followed Congressional directives in setting certain emission levels and determining whether they were stringent enough. When it found the record to be barren, the court said, "We cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Environmental Defense Fund, Inc. v. EPA*, No. 88-1882, 1990 U.S. App. LEXIS 3796 (D.C. Cir. March 13, 1990) (emphasis added). Accordingly, the § 2Q1.3 must be invalidated either on its face or as applied as not following the dictates of Congress.

Not only does § 2Q1.3 produce wide sentencing disparities among environmental offenses, it also produces dramatic departure from the sentences that are currently being imposed under the Guidelines for plainly

more serious offenses as drug dealing, arson, and other major crimes.[17]

Clearly, § 2Q1.3 was promulgated and applied in violation of 28 U.S.C. § 994(f), which requires that the guidelines particularly provide for "certainty and fairness in sentencing and reducing unwarranted sentence disparities." In addition, § 994(j) requires that the guidelines are to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (emphasis added). The presentence report indicated that this was not a serious offense, and indeed, the judge did not even focus on the seriousness of the *offense*. Rather, the court and the prosecutor focused on the *offender*, indicating that Petitioner, who

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[17] *Compare* Petitioner's Crime: Placing Topsoil and Fill on His Own Property: Prison Sentence: 27 months, no probation (§ 2Q1.2, level 16, range 21-27 mos.) *with* Arsonist who endangered the safety of another person (§ 2K1.4:level 10 = 6-12 months with probation possible); defrauding the public up to $2 million (§ 2F1.1:level 15 = 18-24 months); drug trafficking, up to 50 grams of cocaine (about 500 pieces of crack)(§ 2D1.1:level 14 = 15-21 months); managing a crack house (§ 2D1.8: level 16 = 21-27 mos.); reckless involuntary manslaughter-driving while drugged/drunk, knowing of the risk (§ 2A1.4: level 14 = 15-21 mos.); if this were his *second* such homicide, Offender Category II would raise the sentence to only 24 mos. maximum.

Petitioner realizes that he risks inviting criticism from the government when he notes that an arsonist can receive probation whereas Petitioner receives 27 months, for as the Justice Department said in its brief below, these are mixing "apples and oranges" because "arson...generally is directed at a limited number of victims, whereas the victims of [Petitioner's] environmental crimes include the public at large." Govt Br. at 38. It is truly a sad commentary that the Justice Department is of this opinion and that the only way to sentence an arsonist to a comparable prison term to Petitioner's is to charge the arsonist with violating some emission standard under the Clean Air Act.

has no prior criminal history, was a "stubborn" violator of the law. Under that theory, a stubborn jay walker might be treated more harshly than a casual mugger.

Since the Justice Department has announced its intention to use this case and others like it to bring a "reign of terror" upon environmental violators, however minor the offense, this Court should ensure that the rules they play by are lawful ones.

IV. THE SENTENCE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

This Court has never issued a decision on the Excessive Fines Clause. It is important that this issue be settled as the government has made it a practice of seeking astronomical civil penalties and fines in many regulatory contexts, as well as creatively using the Alternative Fines Act, 18 U.S.C. 3571(b). Indeed, the government below argued that Petitioner could have been fined $2,000,000 under the Act. Govt. Br. 39, n.22.

The $200,000 fine here is plainly excessive, and amounts to economic capital punishment. It is the largest fine imposed on an individual for an environmental offense and is greater by 400 fold the median fine for all federal criminals ($525.00). For all the same reasons why the punishment is cruel and unusual, the fines are excessive. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2933-34 (1989) (O'Connor and Stevens, JJ., concurring in part and dissenting in part). Considering that Mr. Pozsgai's gross income is approximately $20,000 per year, that his net income after paying the mortgage on the dumpsite he purchased, and living and business expenses leave him

with no savings, and that he has a negative net worth, the fine imposed is approximately 1,000 percent of his gross annual earnings, and an infinite amount times his net worth. By comparison, the issue in *Browning-Ferris* involved a punitive damage award, which although large, amounted to only about .50 percent of gross earnings ($6 milllion dollar award compared to total annual revenues of $1.3 billion). *Id.* at 2913.

Even if the fines were mandatory, that is no defense to the claim that the fine is nevertheless excessive as imposed. *See United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) ("Even though the statute provides no discretion, the district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds"). The *Busher* court held that the excessiveness of the fine or forfeiture can be judged by applying the proportionality principles of *Solem v. Helm*, 463 U.S. 277 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1640

UNITED STATES OF AMERICA

v.

JOHN POZSGAI
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Crim. No. 88-00450-01
(Honorable Marvin Katz)

Submitted January 12, 1990

Before: GIBBONS, Chief Judge, SCIRICA, Circuit Judge

and BLOCH, District Judge*

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* The Honorable Alan N. Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

1. The court erroneously denied defendant's motion to set aside the verdict and enter judgment of acquittal since the government failed to prove an essential element of the offense, namely, that the site in question was a "water of the United States;"

2. Defendant's activity was authorized by a general permit issued by the Corps on a nationwide basis which does not require an individual permit;

3. The ineffective assistance of defendant's counsel at trail requires that the sentence be vacated or the judgment reversed;

4. Even assuming that the evidence was sufficient to prove that the wetlands were waters of the United States, and that the discharge was not allowable under the nationwide permit, the evidence was insufficient to prove that defendant discharged "pollutants" in violation of 33 U.S.C. § 1311;

5. The sentence imposed under the sentencing guidelines was illegal;

6. The sentence imposed for the pre-guideline counts was an abuse of discretion; and

7. The sentence and fine imposed violate the Eighth Amendment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Attest:

/s/Sally Mrvos
Sally Mrvos, Clerk

January 12, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOHN POZSGAI

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT
Case Number 88-00450

David Sauerbutts
Defendant's Attorney

THE DEFENDANT:

|_| pleaded guilty to counts(s) _____.
|x| was found guilty on count(s) one through forty-one after a plead of not guilty. For purposes of this Judgment, counts thirty-three and thirty-four are treated as a single court.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
33 U.S.C. §§ 1311(a); 1319(c)(2)(A)	Illegal discharge of pollutants	1-41

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence on counts 16-41 of the Indictment is imposed pursuant to the Sentencing Reform Act of 1984. The sentence on counts 1-15 of the Indictment is imposed pursuant to 33 U.S.C. Section 1319(c)(2)(A).

|_| The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

|_| Count(s) _____(is)(are) dismissed on the motion of the United States.

|x| The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

|_| It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
135-32-7859

July 13, 1989
Date of Imposition of Sentence

Defendant's mailing address:
536 West Bridge Street
Morrisville, PA 19067

/s/ Marvin Katz
Signature of Judicial Officer

Marvin Katz, Judge
Name and Title of Judicial Officer

Defendant's residence address:

July 13, 1989
Date

Defendant: John Pozsgai
Case Number: 88-00450

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three (3) years on each of courts one through fourteen and twenty-seven (27) months on each of counts sixteen through forty-one, all to be served concurrently. Sentence of imprisonment on Count Fifteen shall be suspended.

|_| The Court makes the following recommendations to the Bureau of Prisons:

|_| The defendant is remanded to the custody of the United States Marshal.

|_| The defendant shall surrender to the United States Marshal for this district,

a.m.
|_| at _____ p.m. on _____.
|_| as notified by the Marshal.

|_| The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

|_| before 2 p.m. on _____.
|_| as notified by the United States Marshal.
|_| as notified by the Probation Office.

[OMITTED]

Defendant: John Pozsgai
Case Number: 88-00450

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of one (1) year on each of counts sixteen through forty-one concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

|_| The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 4 of 6

PROBATION

The defendant is hereby placed on probation for a term of five (5) years on Count Fifteen. The term of probation shall commence when the defendant has completed his term of imprisonment.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions.

The defendant shall comply with a restoration plan consistent with the Army Corps of Engineers Wetland Restoration Guidelines on such terms as the probation department determines that he is able.

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 5 of 6

STANDARD CONDITIONS OF SUPERVISION

[OMITTED]

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 6 of 6

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $202,000, consisting of a fine of $200,000 and a special assessment of $2,000.

|x| These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

A fine of $55,000 on each of counts one through forty-one and a special assessment of $50 on each of counts one through forty-one.

This sum shall be paid |_| immediately.
|x| as follows: as the probation department determines that he is able.

|_| The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

|_| The interest requirement is waived.

|_| The interest requirement is modified as follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
v.	)	No. 88-450-1
JOHN POZSGAI	)	

TRANSCRIPT OF PROCEEDINGS

of sentence in the above-entitled action on Thursday, July 13, 1989 before the Honorable Marvin Katz, District Judge.

[p. 66]

* * *

THE DEFENDANT: Your Honor, I'm sorry what happened and I could not do better. I could not live with that and I hope you understand I did some wrong and I regret that and I'd like to have an understanding, a break so I don't have to serve time because of my family, my family who will starve if I do time and we lose everything.

MR. SOWERBUTTS: I have nothing further, Your Honor.

THE COURT: Okay. It's hard to visualize a more stubborn violator of the laws that were designed to protect the environment. I think the sentence has to take into account not only punishment for that high degree of willfulness but also serve as a deterrent to others who will doubtless be tempted by economic pres-

sure which many people, I suppose most people share to violate those laws and the deterrence has to be that if they play the lottery of the criminal justice system and are caught that the costs will be high.

The defendant is committed to the custody of the Attorney General, Bureau of Prisons to be imprisoned for a term of three years on each Courts 1 through 14 and 27 months on each of Counts 16 through 41 all to be served concurrently. Sentence of imprisonment on Count 15 is suspended. Upon release from imprisonment, the defendant shall be on supervised release for a term of one year on each of Counts 16 through 41 concurrently. On Count 15 on which I suspended sentence, defendant is placed on probation for a term of five years. The term of probation shall commence when defendant has completed his term of imprisonment. It is a condition of probation that the defendant comply with the restoration plan consistent with the Army Corps of Engineers Wetlands Restoration Guidelines on such terms as the Probation Department determines he is able. The defendant shall pay to the United States the sum of $202,000.00 consisting of a fine of $200,000.00 and a special assessment of $2,000.00.

What I'm doing by way of fine is imposing a fine of $5,000.00 on each of Counts 1 through 41 and special assessment of $50.00 on each of Counts 1 through 41.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES
OF AMERICA

CRIMINAL ACTION

v.

NO. 88-450

JOHN POZSGAI

ORDER

AND NOW, this 13th day of July, 1989, it is hereby ORDERED that bail for defendant Pozsgai is continued on its same conditions pending appeal. The court makes the following findings pursuant to 18 U.S.C. § 3143(b):

1. Defendant has proven by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community if he is released.

2. The appeal is not for the purpose of delay.

3. The alleged failure by the government to prove: (1) that the streams to which the wetlands at issue were adjacent are tributaries of the Pennsylvania Canal; and (2) that the Pennsylvania Canal is a "water of the United States" raises a substantial question of law or fact likely to result in reversal. *See* Defendant John

Pozsgai's Memorandum of Law in Support of His Motion to Set Aside Verdict and to Enter Judgment of Acquittal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

7-19-89 Copy To:
S. Weber, Esq., AUSA
D. Sowerbutts, Esq.
U.S. Probation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES
OF AMERICA

CRIMINAL ACTION

v.

NO. 88-450

JOHN POZSGAI

ORDER

AND NOW, this 27th day of January, 1989, upon consideration of Defendant John Pozsgai's Motion To Set Aside Verdict And To Enter Judgment Of Acquittal and the Government's Memorandum of Law In Opposition To Defendant's Motion To Set Aside The Verdict And To Enter Judgment of Acquittal, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

Dated: January 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1640

UNITED STATES OF AMERICA

v.

JOHN POZSGAI
Appellant

(D.C. Crim. No. 88-00450-01)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges, BLOCH,* District Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in

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*As to panel rehearing only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: February 8, 1990

33 USC § 1311. Effluent limitations

(a) **Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 USC § 1319

(c) (2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402 (b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State; or

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 USC § 1344. Permits for dredged or fill material

(a) **Discharge into navigable waters at specified disposal sites.** The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

(e) **General permits on State, regional, or nationwide basis.** (1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

33 USC § 1362. Definitions.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal, and agricultural waste discharged into water.

33 CFR § 328.3. Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce:

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

* * *

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

28 USC § 991

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices for the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilt of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measure the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

* * *

(b) (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

* * *

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

* * *

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

* * *

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

* * *

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

28 USC § 3553. Imposition of a sentence

(a) ***Factors to be considered in imposing a sentence***.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care,

or other correctional treatment in the most effective manner.

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilt of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

PART Q - OFFENSES INVOLVING THE ENVIRONMENT

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 6 levels; or

(B) if the offense otherwise involved a discharge release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

[OMITTED]

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413.

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.

3. The specific offense characteristics in this section assume knowing conduct. In cases involving negli-

gent conduct, a downward departure may be warranted.

4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.

5. Subsection (b)(2) applies to offense where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Park K (Departures).

6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.

7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the

offense, a departure of up to two levels in either direction may be warranted.

8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

Defendant(s)/ Docket No./Court	Facts and Status
Dale L. Knoedler Jim D. Newman Roger Swenson 84-00059 (D. Neb.)	Facts: Routine EPA inspection discovered facility lacked technical capability to analyze samples for fecal coliform (FC) parameters. Discharge Monitoring Reports stated "0" FC discharge; lab denied testing. Knoedler is sewage treatment technician. Newman is controller and Swenson is plant manager of Dugdale of Nebraska, Inc. 11/19/84: Five-count information filed charging Knoedler and Newman with four counts submitting false statements under Clean Water Act, Sec. 309(c)(2) [33 U.S.C. § 1319(c)(2)]. Swenson charged with one count violation of permit conditions under Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 12/4/84: Knoedler pled guilty to two counts violation of Clean Water Act, Sec. 309(c)(2) and sentenced to one year probation and $300 fine on each count plus court costs. 3/26/85: Five-count superseding information filed against Newman and Swenson charging Newman with four counts violating NPDES permit conditions and Swenson with one count of same violation, all under Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 6/3/85: On scheduled trial date, all charges against Swenson and Newman dismissed on motion by Office of United States Attorney.
George Henry Garson 85-00001 (E.D. Pa.)	Facts: Waste solvents introduced into POTW causing potential fire and explosion hazard. Garson was 71-year-old former president of Barrett Chemical Company.

	1/3/85: One-count information filed charging defendant with violation of pretreatment standards under Clean Water Act. Secs. 307 (b)(1) and 309(c)(1) [33 U.S.C. §§ 1317(b)(1) and 1319(c)(1)].
	1/5/85: Defendant pled guilty.
	1/10/85: Defendant sentenced to $2,500 fine and three years probation, including two hours per week community service during first year.
Ross L. Talbott Ross M. Talbott 85-00012 (D. Colo.)	Facts: Azinphos methyl 50W, a restricted use pesticide, applied inconsistent with labeling to apple orchard and trail park in New Castle. Failure to notify tenants and prevent re-entry for 48 hours, as required. Defendants were corporate principals of Talbott Enterprises, Inc.
	1/11/85: One-count information filed charging both defendants with violation of FIFRA, Secs. 12 and 47 [7 U.S.C. §§ 1361(b)(2) and 136j(a)(2)(G)].
	2/25/85: Both defendants pled guilty to petty offense.
	3/25/85: Ross L. Talbott sentenced to $100 fine and Ross M. Talbott fined $50.
K.W. Thompson Tool Co., Inc. (aka Thompson Center Arms) Robert Gustafson Joseph Behre Emmett Ronayne 85-08	Facts: Dumping of hazardous waste, including cyanide, barium, potassium nitrate and sodium hydroxide, into ditch emptying into Cocheco River and into ground for percolation. Casting wax containing PCBs improperly stored and no records maintained. Company is metal casting and firearms manufacturer in Rochester. Gustafson is president and Ronayne and Behre were vice presidents.

3/18/85: 50-count indictment filed charging:

Company and Ronayne - 41 counts discharge of pollutants without permit in violation of Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)()1)], three counts violating storage, marking and recordkeeping standards relating to PCBs under TSCA, Sec. 15 [15 U.S.C. § 2614], one count treatment, storage and disposal of hazardous waste without permit under RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)], one count failure to notify of release of hazardous waste disposal facility in violation of CERCLA, Sec. 103(c) [42 U.S.C. § 9603 (b)], one count failure to notify of existence of hazardous waste disposal facility in violation of CERCLA, Sec. 103(c) [42 U.S.C. § 9603 (c)], one count false statements in response to industrial waste questionnaire [18 U.S.C. § 1001] and two counts conspiracy to violate Clean water Act (misdemeanor) and RCRA (felony).

Behre - Charged on all same counts except false statements.

Gustafson - 41 counts violation of Clean Water Act, Secs. 301 and 309(c)(1), and three counts violation of TSCA standards.

6/24/85: Jury viewing of site conducted by Court; 6/25/85: Trial began.

7/1/85: Company entered guilty plea to 15 counts in violation of Clean Water Act, Secs. 301 and 309(c)(1), one count under CERCLA, 103(b) and one count under CERCLA, 103(c).

7/2/85: Company sentenced to $4,000 fine on each Clean Water Act count plus $7,500 of each CERCLA count for total of $75,000. Charges against individuals dismissed.

Robert Clements, Inc. 85-00069 (E.D. Va.)	Facts: Failure to notify EPA of release of hazardous substance in excess of one pound from facility in Alexandria. 4/3/85: Company entered guilty plea to one-count information filed same day charging failure to report release of hazardous substance in violation of CERCLA, Sec. 103(b) [42 U.S.C. § 9603(b)]. 4/26/85: Company sentenced to and paid $4,000 fine.
Venus Laboratories, Inc. 85-00238 (N.D. Ill.)	Facts: Liquid chemical wastes, including cleansers, drain cleaners and other cleaning agents discharged into tributary of Des Plaines River without permit. Company allowed contaminated runoff to drain into river via ditch and was believed to have hidden pipe connecting plant drains to city's storm sewers. EPA personnel observed highly contaminated water entering river. 4/17/85: 22-count indictment filed charging Company with negligent discharge of liquid chemical wastes into river without permit in violation of Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 8/1/85: Company entered guilty plea to four counts violation of Clean Water Act. 9/17/85: Company sentenced to $2,500 fine on each count for $10,000 total.
CSI Technologies, Inc. 85-0325 (S.D. Cal.)	Facts: Importation and distribution of specialized high voltage, high frequency capacitors containing PCBs from partner in Columbia under technical assistance contract.

	4/16/85: Seal, four-count information filed charging two felony smuggling counts [18 U.S.C. § 545] and two misdemeanor counts under TSCA, Sec. 15, for illegal distribution in commerce of capacitors containing PCBs [15 U.S.C. § 2614].
	4/18/85: Company waived indictment and pled guilty to information unsealed on this date. Company sentenced to $30,000 fine and ordered to destroy all seized capacitors.
Richard Allen Taggert Keith Egan 85-60016 (D. Or.)	Facts: False statements made to State of Oregon inspector concerning accumulation of hazardous wastes. Egan was plant manager and Taggert was plant superintendent of Evans Transportation Company.
	4/24/85: One-count information charging both defendants with one count false statements under RCRA, Sec. 3008(d)(3) [42 U.S.C. § 6928(d)(3)].
	4/30/85: Egan pled guilty to aiding and abetting making false statements under RCRA.
	5/7/85: Taggert pled guilty to making false statements under RCRA.
	6/4/85: Egan and Taggert each sentenced to $2,500 fine.
Albert Mardikian Garo Mardikian 85-00509 (C.D. Cal.)	Facts: Automobile import and emission testing facility in Orange County used mail fraud scheme to defraud EPA and Customs Service regarding importation of motor vehicles not conforming to Clean Air Act emissions standards and submittal of false test data to EPA from mid-1981 until 1984. Albert Mardikian was chief operations officer and Garo is Albert's nephew and plant manager. Agob was an employee of Albert Mardikian Engineering, Inc.

5/22/85: 35-count felony indictment charging Albert Mardikian with 17 counts mail fraud [18 U.S.C. § 1341] and 18 counts false statements [18 U.S.C. § 1001]. Garo Mardikian was charged with 10 counts of mail fraud.

8/7/85: Trail began.

8/8/85: During presentation of government's case, Albert Mardikian entered guilty plea to nine counts false statements and one count mail fraud. Garo Mardikian entered guilty plea on same date to three counts mail fraud.

Sembat Agob
85-00782
(C.D. Cal.)

8/12/85: One-count information filed charging Agob with one count false statements [18 U.S.C. § 1001]. Agob was an employee of Mardikian Engineering.

8/13/85: Agob waived indictment and pled guilty.

11/4/85: Agob sentenced to five years imprisonment (all but 20 days suspended and served on weekends), five years probation plus 2,500 hours community service.

11/25/85: Albert Mardikian sentenced to five years imprisonment (all but six months suspended), five years probation plus 2,080 hours community service consisting of at least eight hours per week over five-year period teaching under-privileged individuals how to improve job seeking skills; Albert also required to place no fewer than 20 individuals each year into jobs plus restitution to injured parties. Garo Mardikian sentenced to five years imprisonment (all but 30 days suspended and served on weekends), five years probation plus community service over five-year period.

Eric Donald Roth Sr. 85-00119 (E.D. Mo.)	Facts: Five cities paid chemical laboratory in Festus, Missouri to perform tests required by Clean Water Act permits. Laboratory owner submitted false Discharge Monitoring Reports to Missouri Department of Natural Resources. Statements of business associates indicated knowing violations. 5/23/85: 10-count indictment filed charging Roth (d/b/a Analyst Consulting Laboratories, Inc.) with three counts false statements [18 U.S.C. § 1001], two counts mail fraud [18 U.S.C. § 1342] and five misdemeanor counts of false statements under Clean Water Act, Sec. 309(c)(2) [33 U.S.C. § 1319(c)(2)]. 8/1/85: Roth pled guilty to one felony count of false statements and two misdemeanor counts of false statements. 9/6/85: Roth sentenced to four months imprisonment on each Clean Water Act count (terms to run concurrently). Sentencing on felony count suspended pending completion of five years probation and 200 hours community service.
Layton Brothers Drum Company, Inc. Willie Frank Hines 85-00174 (D. Colo.)	Facts: Storage and disposal of hazardous waste without permit, and transportation of hazardous waste via interstate highway I-70 through Eisenhower Tunnel without manifests. Oils and other liquid refuse matter channeled via earth trench into Ralston Creek without permit. Hines was Company manager. 5/23/85: 11-count indictment filed charging Company with three counts disposal of hazardous waste without permit and four counts storage of hazardous waste without permit, all in violation of RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)], one count false statements [18 U.S.C. § 1001], one count violation of the Rivers and Harbors Appropriation Act of 1899 (Refuse Materials Transportation Act

	(HMTA) [49 U.S.C. § 1809]. Hines charged with one count false statements. 7/12/85: Superseding information filed against same defendants charging same counts. 9/12/85: Company entered guilty plea to one count violation of Refuse Act and one count violation of HMTA. Charges against Hines dismissed. 10/24/85: Company sentenced to $10,000 fines on HMTA count and $2,000 fine for Refuse Act violation.
Frankel Manufacturing Company 85-224 (D. Colo.)	Facts: Storage of hazardous waste without permit in excess of 1,000 kilograms. 7/17/85: Company waived indictment and entered plea of guilty to information filed on same date charging one count violation of RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928 (d)(2)]. 8/30/85: Company sentenced to $200,000 fine and three years probation. First $100,000 payable in two annual installments beginning 8/30/86. Remaining $100,000 suspended if terms of probation, including cleanup and $100 assessment to Crime Victims Fund are met.
Fried Industries, Inc. 85-58 (D. N.J.)	Facts: Manufacturer of cleaning agents and detergents stored and disposed of industrial chemicals containing methylene chloride, trichloromethane, phenanthrene and bisphthalate without permit and without notification to EPA. 7/31/85: Company waived indictment and pled guilty to two-count information filed same date charging one count storage of hazardous waste without permit in violation of

RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)] and one count failure to notify of release of hazardous substance under CERCLA, Sec. 103(b) [42 U.S.C. § 9603(b)]. Company sentenced on same date to $40,000 fine.

Peter J. Vileisis, Jr.
Maurice Fabiani
Waterbury House Wrecking Co., Inc.
N-85-46
(D. Conn.)

Facts: Building demolition of Old Pin Shop in Oakville without notice to EPA, without removing asbestos prior to demolition and without wetting asbestos material exposed during operation. Vileisis is president of Company and Fabiani is owner of Old Pin Shop.

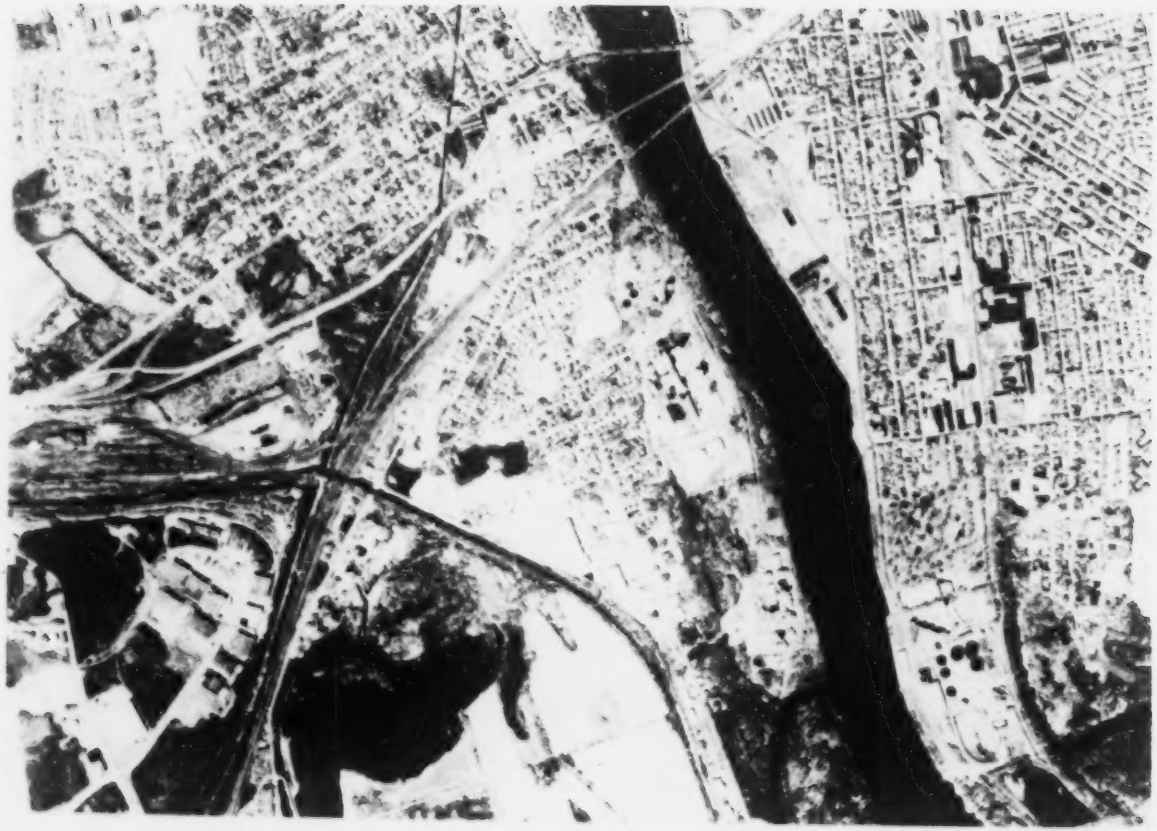
8/1/85: Five-count indictment filed charging Company and Vileisis with three counts causing asbestos emissions in violation of Clean Air Act, Secs. 113(c)(1)(C), 112(c)(1)(B) and 112(e)(5) [42 U.S.C. §§ 7413(c)(1)(C), 7412(c)(1)(B) and 7412(e)(5)] and of 40 CFR § 61.146, and Fabiani with two counts of same Clean Air Act violations.

11/4/85: Vileisis pled guilty to one count superseding information filed same date charging failure to remove asbestos prior to commencement of demolition in violation of Clean Air Act, Secs. 113(c)(1)(C), 112(c)(1)(B) and 112(e)(5) [42 U.S.C. §§ 7413(c)(1)(C), 112(c)(1)(C) and 112(e)(5)] and 40 CFR § 61.147.

11/5/85: Fabiani pled guilty in same charge in one-count superseding information filed this date.

12/19/85: Vileisis sentenced to one year suspended sentence, five years probation, $25,000 fine plus $25 penalty assessment, 1,000 hours community service and must attend, at own expense, seminars on disposal of asbestos. Fabiani sentenced to one year imprisonment (all but 30 days suspended), five years probation, $25,000 fine plus $25 penalty assessment and 1,000 hours community service.

	12/23/85: Charges dismissed against Company. 5/5/86: Old Pin Shop and Waterbury House Wrecking each placed on EPA's List of Violation Facilities under 40 CFR Part 15 resulting in ineligibility for EPA contracts, grants and loans.
Richard M. Mims 85-252 (N.D. Tex.)	Facts: Mims was former president of Brass Mill Co., a brass plating company, which directed employees to dump a dozen 55-gallon drums of toluene at L.B. Houston Nature Area. 8/20/85: One-count indictment filed charging defendant with disposal of hazardous waste without permit 3008(d)(2) [42 U.S. § 6928(d)(2)]. 8/28/85: Defendant pled guilty. 9/25/85: Defendant sentenced to two years probation and $2,500 fine payable either in lump sum or monthly installments.



POZSGAI SITE

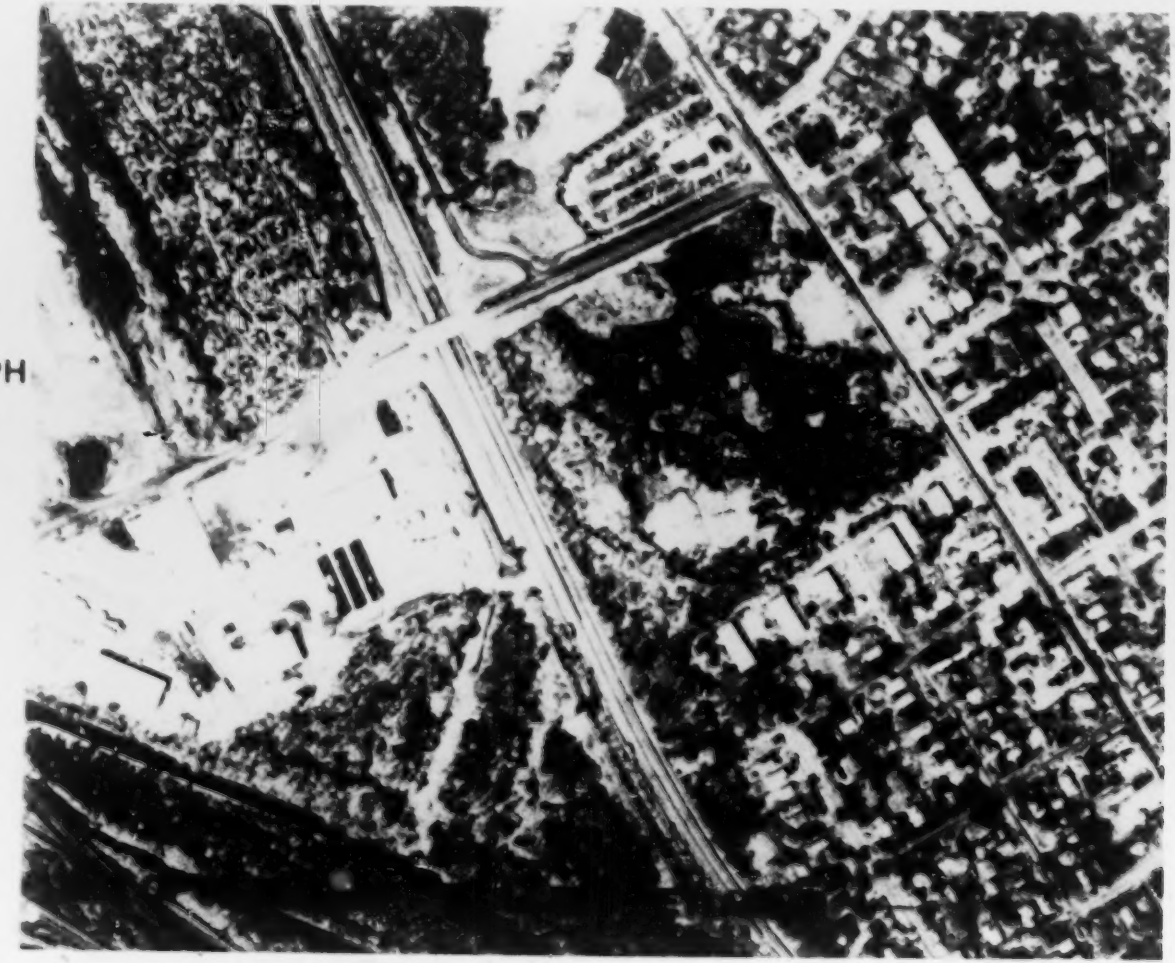
1985 AERIAL PHOTOGRAPH

TAKEN MARCH 1985

INSET OF GOVT. EXH. 1
(Pozsgai Property Top Half)

POZSGAI SITE

1987 AERIAL PHOTOGRAPH
TAKEN APRIL 14. 1987



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